Filed 8/26/19 Richardson v. Stevenson CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAN RICHARDSON et al.,	
Plaintiffs and Respondents,	G056112
v.	(Super. Ct. No. 30-2014-00714844)
CLINT R. STEVENSON,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, James L. Crandall, Judge. Reversed and remanded with directions.

Law Offices of Andrew W. Couch and Andrew W. Couch for Defendant and Appellant.

Hart King, William R. Hart, Robert M. Dickson, Rhonda H. Mehlman for Plaintiffs and Respondents.

After being voluntarily dismissed from litigation before trial, Clint Stevenson moved for attorney fees under Civil Code section 5975.[1] The trial court denied the motion, determining Stevenson was not sued for a breach of the governing documents, as required by section 5975. It also determined Stevenson was not a prevailing party because it was unclear whether he would ultimately retain the improvements that were the subject of the litigation. The order denying Stevenson's motion for attorney fees is reversed and remanded for further proceedings consistent with this opinion.

FACTS

This appeal is a companion case to *Richardson v. Huntington Pacific Beach House Condominium Association* (Aug. 26, 2019, G055884) [nonpub. opn.]), and is based on the same facts.[2] The companion case involves the underlying suit by condominium owners Dan Richardson, Andrea Richardson, and Judith Carter (collectively Respondents) against fellow condominium owner Stevenson and the Huntington Pacific Beach House Condominium Association (HOA). Stevenson applied to the HOA's architectural review committee (ARC) for approval of his project to convert an existing window to a door in his unit's exterior wall. The ARC approved Stevenson's project, without submitting it to a vote of the HOA membership.

Respondents sued Stevenson in his individual capacity as an owner of a unit in the complex and the HOA. The initial complaint alleged a single cause of action for injunctive relief against both Stevenson and the HOA. The complaint was amended to add two causes of action only as to the HOA. The operative complaint alleged, "[Respondents] are informed and believe that [the HOA] and/or Stevenson have

---

[1] All further statutory citations are to the Civil Code.

[2] In the interests of brevity, we provide only a general overview and otherwise do not repeat the facts or address the issues where the two cases are identical.

commenced work in the common area that will be affected by the construction project that is the subject of this lawsuit. [Respondents] are informed and believe that such work has commenced and is being undertaken in contravention of the [HOA's] rules and/or applicable provisions of the Davis-Stirling [Common Interest Development Act (Davis-Stirling Act)]." (§ 4000 et seq.) Also, "Because the work conducted or performed by the [HOA] and/or Stevenson is in violation of the [HOA's] rules and the Davis-Stirling Act the 'improvements' or construction conducted in the common area is subject to removal at the expense of [Stevenson and the HOA]."

It further claimed the approval of the project was "undertaken by [Stevenson and the HOA] with full knowledge of their breach of the applicable rules and the Davis-Stirling Act and in willful, conscious, and reckless disregard for the fiduciary duties owed to [Respondents] and the other members of the [HOA]." The only relief sought against Stevenson in the prayer for relief was that: (1) he be enjoined from conducting any further construction on the project; and (2) the common area adjacent to Stevenson's property be restored at [his and the HOA's] expense. As to the HOA, Respondents sought: (1) a declaration the HOA's approval of the installation of the a new pathway be declared null and void; (2) an injunction against the HOA's board (of which Stevenson was not a member) from meeting in contravention of the governing documents and the Davis-Stirling Act; (3) an injunction requiring the HOA to restore the common area next to Stevenson's unit at its expense; and (4) attorneys' fees and costs subject to proof.

Respondents voluntarily dismissed Stevenson from the case without prejudice, five weeks before the trial date and nearly three years after filing suit. Respondents described their decision to dismiss Stevenson as a "tactical" one. "As the case neared trial Plaintiffs made a tactical decision to dismiss . . . Stevenson without prejudice. Attorney-client privilege prohibits a detailed explanation of this decision." There was no settlement of the underlying case which prompted the filing of the request

for dismissal, as the case proceeded to trial between Respondents and the HOA. There is no record of a settlement between Respondents and Stevenson, and Stevenson's opening brief on appeal states, "[t]here was no settlement or other agreement between [Respondents] and Stevenson which preceded or prompted the filing of the [r]equest for [d]ismissal."

After dismissal, Stevenson moved for attorney fees under section 5975. The trial court denying Stevenson's motion, finding: "Stevenson has not met his burden showing he is entitled to statutory fees as the prevailing party in this action. Further, it cannot be determined at this point whether . . . Stevenson is the prevailing party for purposes of a fee award based on a theory he obtained his litigation purpose. Whether or not . . . Stevenson will be able to maintain the renovations [converting the window into a door] has yet to be determined." It also explained, "Stevenson argues his 'litigation purpose' was to be able to install, and keep, the renovations with regard to the placement of the door, removal of the planter and construction of the walkway. The court did deny the motion for preliminary injunction prohibiting the immediate installation of the door, walkway, etc. So in that sense, . . . Stevenson did obtain at least a part of his litigation purpose. [¶] However, the issue of the permanent injunction against the HOA has not yet been determined. Whether or not . . . Stevenson will be able to maintain the renovations is up to the trier of fact. Therefore, it cannot be said . . . Stevenson is a prevailing party because he obtained his litigation purpose."

For the first time on appeal, Stevenson asserted he was also entitled to attorney fees pursuant to Code of Civil Procedure section 1032. He contends Code of Civil Procedure section 1032 is applicable because section 12.1 of the HOA's declaration of covenants, conditions, and restrictions (CC&Rs) provides, in pertinent part: "The failure of any [o]wner . . . to comply with any of the [r]estrictions shall be grounds for relief which may include, without limitation, an action . . . for . . . injunctive relief . . . . Any judgment rendered in any action or proceeding pursuant to this [d]eclaration shall

include a sum for attorneys' fees in such amount as the [c]ourt may deem reasonable, in favor of the prevailing party . . . ."

DISCUSSION

Respondents contend the trial court correctly determined Stevenson was not entitled to attorney fees under section 5975 because their action against Stevenson was not to enforce the CC&Rs, but rather based solely upon a violation of the Davis-Stirling Act. We disagree.

Section 5975 provides, in pertinent part, "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." In order to obtain an attorney fee award, a party must establish both that the action was to enforce the CC&Rs and the moving party prevailed. (*Grossman v. Park Fort Washington Assn.* (2012) 212 Cal.App.4th 1128, 1133.) "Reviewing courts have found this provision of the Davis-Stirling Act "'reflect[s] a legislative intent that [the prevailing party] receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied. [Citations.]"' (*Almanor Lakeside Villas Owners Association v. Carson* (2016) 246 Cal.App.4th 761, 773.) The "Davis-Stirling Act does not define 'prevailing party' or provide a rubric for that determination. In the absence of statutory guidance, California courts have analyzed analogous fee provisions and concluded that the test for prevailing party is a pragmatic one, namely whether a party prevailed on a practical level by achieving its main litigation objectives. [Citations.]" (*Ibid*.) A determination of the legal basis for an attorney fee award is a question of law this court reviews de novo. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

In determining whether an action is one to enforce the governing documents under section 5975, courts look to the substance of the claims asserted. "We see nothing in the Davis-Stirling Act that suggests we should give more weight to the form of a complaint. . . . than to the substance of the claims asserted and relief sought, in

determining whether an action is one 'to enforce the governing documents' in the meaning of section 5975." (*Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 260.) Here, the trial court explained: "Stevenson was only named in the first cause of action for injunctive relief. Although the allegations do state that Stevenson was a member of the Architectural Review Committee ('ARC') and that the ARC did not comply with the mandates of the CC&Rs with regard to . . . Stevenson's proposed renovations, there are no allegations implying the Second Amended Complaint was seeking damages against . . . Stevenson for breach of his duties as a member of the ARC. [¶] . . . [¶] As such, the gravamen of the Second Amended Complaint does not seek to hold Stevenson individually liable for his acts or omissions as a member of ARC. Instead, this claim sought to enjoin him from proceeding with the renovations. Plaintiffs did not sue Stevenson for a breach of the governing documents."

Stevenson claims the joint allegations against him and the HOA that reference the CC&Rs demonstrates he was sued under the governing documents. The relief sought against Stevenson was to enjoin him from conducting any further construction on the project and to restore the common area adjacent to Stevenson's property be restored at his and the HOA's expense. As to the HOA, Respondents sought, among other things, an injunction against the HOA's board (of which Stevenson was not a member) from meeting in contravention of the governing documents and the Davis-Stirling Act.

Respondents admit they sued the HOA for violations of the Davis-Stirling Act and the governing documents. They dispute suing Stevenson for violating the governing documents. They make this distinction while conceding the operative complaint includes allegations Stevenson and the HOA contravened and violated the HOA's governing documents. Respondents argument stands or falls upon the allegations of their pleadings and motions, rather than on their purported intent after the fact. A fair reading of those allegations undercuts Respondents' argument.

Respondents argue, which the trial court credited, their prayer for relief demonstrated the claims against Stevenson did not involve allegations concerning the governing documents. We first note the prayer is not part of the cause of action. The issues involved are determined by the facts alleged, not from the relief requested. (*Berg v. Investors Real Estate Loan Co.* (1962) 207 Cal.App.2d 808, 815.)

In any event, the prayer requests the common areas be restored "at the Defendants' expense [*i.e.*, Stevenson's and the HOA's]." Respondents find it "evident from the [p]rayer for [r]elief (sic) that while the HOA was sued to, among other things, enforce the governing documents, Stevenson was not." We are not convinced. The parties concede the HOA was sued based on the governing documents. There is no distinction made between the HOA and Stevenson in the relevant allegations. Because Respondents sued Stevenson in the first cause of action on the same bases as the HOA, he, too, was sued on the governing documents.

Additionally, Respondents assert, "[T]here is nothing in the governing documents, and Stevenson points to nothing, that would have allowed for an injunction against Stevenson regarding the installation and removal of the door and/or sidewalk." They claim such injunctive "relief stems solely from . . . the Davis-Stirling Act . . . ." The argument alleges Respondents could not have brought an action against Stevenson for injunctive relief under the governing documents so it must have been proceeding against him solely under the Act. The argument fails.

An action for injunctive relief by a homeowner against another homeowner is expressly provided for in section 12.1 of the CC&Rs, as identified by Stevenson in his opening brief on appeal.[3] Section 12.1 of the CC&Rs provides, in pertinent part: "The failure of any [o]wner . . . to comply with any of the [r]estrictions shall be grounds for relief which may include, without limitation, an action . . . for . . . injunctive relief . . . ."

---

[3] Respondents failed to address this argument.

Furthermore, "any [o]wner . . . shall be entitled to bring an action for damages against any defaulting [o]wner, and in addition may enjoin any violation of this [d]eclaration." That is what occurred here. The Respondent owners brought an action against owner Stevenson for injunctive relief. They initially sought to prevent Stevenson from completing his project. After the project was completed, they wanted to remove the improvements and sought damages for the cost of their removal. Because section 12.1 of the CC&Rs provides for the relief sought against Stevenson, we cannot say Respondents' claim against Stevenson was brought solely under the Davis-Stirling Act. Thus, the attorney fee provision in section 5975 is triggered.

While we find error with the trial court's determination the action was not one to enforce the governing documents, as required by section 5975, that does not end our inquiry. In order for Stevenson to be awarded attorney fees, the court must also determine whether he was a prevailing party. Here, it appears the trial court believed it was without discretion to make a prevailing party determination. It was not.

The trial court should have analyzed whether Stevenson was a prevailing party at the time of dismissal. The court erroneously believed it could only determine Stevenson fulfilled his litigation objectives on a practical level if he ultimately retained his improvements. Not so. After Respondents dismissed Stevenson, nearly three years into the case and just five weeks before trial, he became a stranger to the case. It is unfair for Stevenson's success to be determined based upon the outcome of a case he no longer can participate in or defend against.

Indeed, courts have found defendants have reached their practical litigation objectives where litigation terminated in voluntary dismissal, because "[t]he objective of the . . . defendants in this litigation was to prevent plaintiffs from obtaining [the requested] relief. Because the litigation terminated in voluntary dismissal with prejudice, plaintiffs did not obtain by judgment any of the relief they requested, nor does it appear that plaintiffs obtained this relief by another means, such as a settlement. Therefore,

plaintiffs failed in their litigation objective and the seller defendants succeeded in theirs." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 609; see also *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1154-1155 [awarding fees under the Davis-Stirling Act where plaintiff voluntarily dismissed several causes of action without prejudice against defendant homeowner association before trial].)

Furthermore, for the first time on appeal, Stevenson contends he is also entitled to attorney fees under Code of Civil Procedure section 1032. This issue was not before the trial court, however, we may consider a new issue of law based on undisputed facts in the record. (*Retzloff v. Moulton Parkway Residents' Association, No. One* (2017) 14 Cal.App.5th 742, 747-748.) As discussed above, the underlying action was one seeking injunctive relief pursuant to the Davis-Stirling Act and arising from the CC&Rs. The CC&Rs mandate an award of attorney fees to the prevailing party in an action between owners.

Where attorney fees are sought as costs in an action arising out of a contract, but not based on a breach of contract, Code of Civil Procedure section 1032 applies.[4] Attorney fees are "allowable as costs under [s]ection 1032" when they are "authorized by" either "[c]ontract," "[s]tatute," or "[l]aw." (Code Civ. Proc., § 1033.5, subd. (a)(10).) In other words, recoverable costs include attorney fees "if, but only if," the party seeking such fees has "a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.) For purposes of the statute, "Prevailing party" includes "a defendant in whose favor a dismissal is entered." (Code Civ. Proc. § 1032, subd. (a)(4).) The predominant view is that under Code of Civil

---

[4] We recognize section 1717 bars a dismissed party's recovery of attorney fees incurred defending a contract claim. Here, however, the action for injunctive relief was a non-contract claim merely arising from the CC&Rs and the Davis-Stirling Act. Respondents do not argue otherwise.

Procedure section 1032, a defendant may recover contractual attorney fees after voluntary dismissal of a non-contract claim as costs. (*Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 428.)

Thus, we conclude the trial court improperly failed to determine whether Stevenson was a prevailing party pursuant to section 5975. However, notwithstanding this error, we conclude Stevenson is a prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4). As such, he is entitled to attorney fees as costs, pursuant to section 12.1 of the CC&Rs. On remand, the court must make an award of reasonable attorney fees and costs.

DISPOSITION

The trial court's order denying Stevenson's motion for attorney fees is reversed. The matter is remanded to the trial court to make an award of reasonable attorney fees and costs. Stevenson is entitled to his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.